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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION,

and

UNITED RETAIL & WHOLESALE EMPLOYEES TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants,

v.

YAHN & MCDONNELL, INC., AND THE PENNSTAR COMPANY,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE APPELLEES

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QUESTION PRESENTED

Can Congress, consistent with the Due Process Clause of the Fifth Amendment, give a "presumption of correctness" to a private party's determination of another private party's liability where the favored party has a legal duty and personal interests that conflict with a neutral and detached determination?

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Mobile, Jackson & K.C. R.R. v. *Turnipseed*, 219 U.S. 35 (1910) 34
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T.I.M.E.-DC, Inc. v. *New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621 (N.D.N.Y.), *aff'd per curiam*, 735 F.2d 60 (2d Cir. 1984) 16, 24

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UMW 1974 Pension Plan & Williamson Shaft Contracting Co., 6 Employee Benefits Cas. (BNA) 1593 (1985) 33

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Withrow v. *Larkin*, 421 U.S. 35 (1975) 33

Statutes and Regulations:

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29 U.S.C. § 186(c)(5) (1982) 7, 8, 13

Employee Retirement Income Security Act,

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29 U.S.C. § 1109 (1982) 11

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Multiemployer Pension Plan Amendments Act of 1980,

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29 U.S.C. § 1381(b) (1982) 3

29 U.S.C. § 1382 (1982) 3

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29 U.S.C. § 1383(a) (1982)	22
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29 U.S.C. § 1383(c) (1982)	22
29 U.S.C. § 1383(d) (1982)	22
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29 U.S.C. § 1405(d) (1982)	22
29 C.F.R. § 2641.7(a)(1) (1986)	23
29 C.F.R. § 2641.9 (1986)	36
48 Fed. Reg. 31,251 (1983)	28
50 Fed. Reg. 34,679 (1985)	14

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U.S. Const. amend. V	*passim*

Legislative Material:

Central States Teamsters' Fund: Subcomm. on Oversight of the House Comm. on Ways and Means, 95th Cong., 2d Sess. (Mar. 22, 1978)	19-20
Central States Teamsters' Fund: Subcomm. on Oversight of the House Comm. on Ways and Means, 95th Cong., 2d Sess. (July 17-18, 1978)	20

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Central States Teamsters' Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means, 95th Cong., 2d Sess. (Mar. 24, 1980) 20

Federal Pension Law Enforcement in Case of Teamsters' Central States Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means, 95th Cong., 1st Sess. (Mar. 14 & 15, 1977) 19

Federal Pension Law Enforcement in Case of Teamsters' Central States Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means, 95th Cong., 1st Sess. (Apr. 5 & July 19-20, 1977) 19

Findings and Conclusions, H.R. Rep. No. 177, 97th Cong., 1st Sess. (1981) 19

H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918 ..... 12, 36

H.R. Rep. No. 869, pt. II, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Admin. News 2993 35

Investigation of Alleged Irregularities in the Operation of the Teamsters' Central States Pension Fund: Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. (July 1, 1976) 19

Multiemployer Pension Plan Stabilization Act of 1981: Hearings on S. 1748 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 97th Cong., 2d Sess. (1982) 4

Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare & Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education & Labor, 96th Cong., 2d Sess. (1979) 22

TABLE OF AUTHORITIES—Continued

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Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations* (Comm. Print 1980)	36
The Teamsters' Central States Pension Fund: Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. (July 18-19, 1977)	19-20
Teamsters' Central States Pension Fund: Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. (Aug. 25-26 & Sept. 29-30, 1980)	20
120 Cong. Rec. 29,929 (1974)	11
126 Cong. Rec. 23,288 (1980)	11
Articles:	
Amoroso, *Withdrawal Liability*, Employee Benefits J., June 1982	26
Brennan, *Multiemployer Plan Withdrawal Liability: An Actuary's View*, Pension World, Oct. 1982	27
Collins, *Union Eyes Staff at Penn*, Philadelphia Inquirer, Mar. 1, 1986, at B5	15
Feuer, *The Selection and Arbitration of Withdrawal Liability Interest Rates*, Employee Benefits J., Mar. 1985	26
Fleeson, *The Toughest, Meanest Union Boss in Town*, Philadelphia Inquirer Magazine, Sept. 4, 1983, at 10	15
Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975)	9
Harrold, *Withdrawal Liability—Which Interest Rate to Use*, Int'l Found. of Employee Benefits Digest, June 1985	28
Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739 (1976)	37-38

TABLE OF AUTHORITIES—Continued

Miscellaneous: Page

ABC World News Tonight (Dec. 29, 1986) 21
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Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, *1985 Annual Report of the Trustees* 3
Central States, Southeast and Southwest Areas Pension Fund, Revised and Amended Trust Agreement, art. XIV, § 1 2
Comment Letter to Office of General Counsel, PBGC, from Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans (Sept. 6, 1983) 23
Comptroller General of the United States, *Investigation to Reform Teamsters' Central States Pension Fund Found Inadequate* (GAO/HRD-82-13, Apr. 28, 1982) 19, 30
Comptroller General of the United States, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (GAO/HRD-85-16, Mar. 14, 1985) 25, 27, 28, 29
D. McGinn, *Actuarial Fundamentals for Multiemployer Plans* (1982) 3
Magna Charta, *reprinted in* 1 Del. Code Ann. (1975) 9
J. Marshaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, *Social Security Hearings & Appeals* (1978) 37
Memorandum from Philip B. Polak to Board of Trustees, M.M. & P. Pension Fund (Apr. 8, 1981) 29
Pension Benefit Guaranty Corporation, *Multiemployer Study Required by P.L. 95-214* (July 1, 1978) 2
9 Pension Reporter (BNA) No. 396 (June 7, 1982) 3
Pension and Welfare Benefits Administration, U.S. Dep't of Labor, *Employee Retirement Income Security Act, 1984 Report to Congress*.... 20

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President's Commission on Organized Crime, *Organized Crime and Labor-Management Racketeering in the United States, Record of Hearing IV* (Apr. 22-24, 1985) 18-19, 20, 21

United Retail and Wholesale Employees Union Local No. 115 Joint Pension Plan, art. VIII, § 8.1 (as amended & restated Jan. 1, 1976) 6

United States Dep't of Labor, *The Funding Status of Multiemployer Pension Plans and Implications for Collective Bargaining* (1985) 2

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BRIEF FOR THE APPELLEES

STATEMENT OF THE CASE

A. Statutory Background

Under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA" or "the Act"), 29 U.S.C. §§ 1381-1461 (1982 & Supp. II 1984), an employer who "withdraws" from a multiemployer pension plan must pay a portion of the plan's unfunded vested benefits. Such plans are set up through collective bargaining agreements between employers and labor unions. *See* Labor-Management Relations Act of 1947, § 302(c), 29 U.S.C.

§ 186(c) (1982). Employers typically make contributions at a fixed rate specified in the collective bargaining agreement and have no contractual obligation for benefits beyond that commitment.[1] Decisions regarding benefit levels and criteria are vested in the trustees of the plan, and the individual employer typically has no control over those decisions.[2] The liability imposed by the MPPAA is thus noncontractual and arises solely by operation of statute. As the Seventh Circuit stated: "Liability under the MPPAA is not a contractually or pri-

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[1] Pension Benefit Guaranty Corporation, *Multiemployer Study Required by P.L. 95-214*, at 2-3 (July 1, 1978): "In most instances an individual employer's obligation to contribute to the plan and its involvement with the plan has been limited to making the contributions required under the collective bargaining agreement regardless of whether those contributions prove sufficient to provide the benefits established by the joint board." *See also* United States Department of Labor, *The Funding Status of Multiemployer Pension Plans and Implications for Collective Bargaining* at 15 (1985):

> The distinguishing characteristic of defined benefit multiemployer plans is that the collective bargaining agreement typically provides for the individual employer in the plan to contribute a specified amount of money to a central fund on the behalf of employees. Determination of the benefits is left to the discretion of a joint employer-union board of trustees.

[2] *See Sinai Hospital of Baltimore* v. *National Benefit Fund*, 697 F.2d 562 (4th Cir. 1982) (provision in collective bargaining agreement limiting increase in benefits not bar to trustees' increase); *NLRB* v. *Local 582, International Bhd. of Teamsters*, 670 F.2d 855 (9th Cir. 1982) (refusal by employers to agree to specific benefit in collective bargaining did not preclude multiemployer welfare fund from granting benefit).

The Trust Agreement for the Central States, Southeast and Southwest Areas Pension Fund ("Central States Fund")—the largest multiemployer pension plan—is typical in its express limitation of an employer's control and responsibility for the actions of the trustees: "Upon transfer of each contribution to the Trustees, all responsibilities of the Employers for such contributions shall cease, and the Employers shall have no responsibilities for the acts of the Trustees." Revised and Amended Trust Agreement, art. XIV, § 1.

vately created burden, rather it is imposed by law . . . ." *Peick* v. *PBGC*, 724 F.2d 1247, 1277 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). *See generally Connolly* v. *PBGC*, 106 S. Ct. 1018, 1029-31 (1986) (O'Connor, J., concurring). The amount of the liability can exceed the employer's net worth.[3]

The determination of withdrawal liability is given in the first instance to the pension plan. 29 U.S.C. § 1382 (1982).[4] To calculate liability, the plan must determine whether a withdrawal has occurred and then allocate to the employer a portion of "unfunded vested benefits," *id.* § 1381(b) (1982); *i.e.*, the difference between the present value of the pension fund's assets and its future vested payout obligations. *Id.* § 1393(c) (1982). Determining unfunded vested benefits requires numerous actuarial assumptions concerning such matters as mortality, retirement ages or rates, expenses, investment return, and withdrawal rates. 9 Pension Reporter (BNA) No. 396, at 814 (June 7, 1982). *See generally* D. McGinn, *Actuarial Fundamentals for Multiemployer Plans* 25-31 (1982).

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[3] *See* Interview with Arthur H. Bunte, Jr., Employer Trustee of Central States, Southeast and Southwest Areas Pension and Health and Welfare Funds, in *1985 Annual Report of the Trustees* at 8: "Deregulation [of the trucking industry] severely threatened weaker companies. Many of them couldn't afford to sell or go out of business because their withdrawal liability . . . often was greater than [their] assets."

[4] Section 1382 states:

> When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

The Act permits a pension plan to use its own assumptions so long as they "in the aggregate, are reasonable (taking into account the experience of the plan and reasonable expectations)." 29 U.S.C. § 1393(a)(1) (1982). Complete data are not required in making these determinations:

> [T]he plan actuary may . . . in the absence of complete data, rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan.

Id. § 1393(b)(2).

Once the plan determines the employer's allocated portion of unfunded vested benefits,[5] it must then determine whether one of a number of statutory exemptions reduces or eliminates the liability. The plan then notifies the employer of the amount of the assessment.

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[5] The statute prescribes four methods for allocating unfunded vested benefits: the presumptive method, the modified presumptive method, the rolling five method, and the direct attribution method; the plan determines which to use. 29 U.S.C. § 1391 (1982). The first three methods assign the employer a portion of unfunded vested benefits based on the ratio of the employer's previous contributions to the total contributions. The direct attribution method, which is little used by pension funds, assigns the employer the unfunded vested benefits of his own employees plus a portion of the unfunded vested benefits of other employers' employees.

Under the first three methods, there is no necessary connection between the amount of withdrawal liability and the amount necessary to fund the benefits for the employer's own employees; withdrawal liability therefore often goes to support the benefits of other employers' employees. Indeed, withdrawal liability is assessed even if an employer's previous contributions were sufficient to fund completely the vested benefits of the employer's own employees. *See Multiemployer Pension Plan Stabilization Act of 1981: Hearings on S.1748 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. 57 (1982) (statement of James H. Hunt, President, Bangor Punta Marine); *id.* at 75 (statement of Dennis L. Hansen, Secretary and Treasurer, Ramsey Winch Company).

If the employer disputes certain of the plan's factual determinations, he must take the dispute to arbitration. In arbitration, the plan's findings of fact are presumed correct:

> For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.

29 U.S.C. § 1401(a)(3)(A) (1982). In addition, the plan's actuarial assumptions and methods for determining unfunded vested benefits are to be presumed correct. *Id.* § 1401(a)(3)(B). These presumptions carry over into a review by a federal district court, where "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." *Id.* § 1401(c).

B. Factual Background

Appellee Yahn & McDonnell, Inc. ("Yahn") renewed in December 1980 its collective bargaining agreement with Teamsters Union Local 115 ("the Union"). Under the terms of that and prior agreements,[6] Yahn agreed to make specified weekly contributions to the Union's ERISA pension plan, appellant United Retail and Wholesale Employees Teamsters Union Local No. 115 Pension Plan ("Plan"), on behalf of all Yahn employees represented by the Union.

As is typical of such agreements (*see* notes 1-2 *supra* and accompanying text), Yahn's contractual obligation was limited to making the specified contributions, and the agreement itself did not provide for the imposition of

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[6] The basic agreements were negotiated by a multiemployer bargaining group, the Philadelphia Association of Tobacco and Confectionary Distributors, of which Yahn was a member.

withdrawal liability. *See* JS 6a.[7] As is also typical, the individual employer had no control over the administration of the Plan: "The Pension Plan shall be administered solely by the Trustees, and the decisions of the Trustees in all matters pertaining to the administration of the Pension Plan shall be final." United Retail and Wholesale Employees Union Local No. 115 Joint Pension Plan, art. VIII, § 8.1 (as amended & restated Jan. 1, 1976).

Yahn ceased operations in November 1981, thereby "withdrawing" from the Plan within the meaning of the MPPAA. The Plan demanded withdrawal liability totalling $457,779, an amount almost double the company's contributions for the years 1976-1980.[8] The Plan informed Yahn that the Plan would look to Yahn's parent company, appellee The Pennstar Company ("Pennstar"), for payment if Yahn could not pay. JS 7a. Yahn requested review of the assessment pursuant to the statute, *see* 29 U.S.C. § 1399(b)(2) (1982), and the trustees refused to alter the assessment after conducting the review. Yahn demanded arbitration, and the parties agreed to hold arbitration in abeyance pending resolution of the constitutional issues. JS 7a.

In April 1983, the Plan brought suit in the District Court for the Eastern District of Pennsylvania against Yahn seeking a withdrawal liability payment. *Id.* In addition to certain statutory arguments not relevant here, Yahn defended on the basis that the MPPAA de-

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[7] References in this brief to appellant Pension Benefit Guaranty Corporation's ("PBGC") Jurisdictional Statement and accompanying appendix will be cited "JS ——"; references to appellant PBGC's Brief on the merits will be cited "PBGC Brief at ——"; references to the appellant Plan's Brief on the merits will be cited "Plan Brief at ——".

[8] Yahn made all required contributions under the contract and contributed over $260,000 for the years 1976-1980. *See* Appendix A hereto, at 10a (Plan's calculation for Yahn's withdrawal liability).

nied it due process. The district court granted summary judgment against Yahn and held that the MPPAA does not violate procedural due process. The court below reversed, concluding that "because the trustees are biased and have significant discretion, and because their determination of liability is deferentially reviewed in arbitration and in district court, we believe MPPAA deprives employers of their constitutional right to a fair hearing." JS 28a. The court further concluded that declaring unconstitutional the presumption in section 1401(a)(3)(A) rescued the statutory framework's constitutionality. *Id.* 32a-33a.

SUMMARY OF ARGUMENT

The court below declared unconstitutional section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. § 1401(a)(3)(A) (1982). The decision eliminates a critical element of unfairness from the procedures mandated by the MPPAA for the resolution of the withdrawal liability assessments made by multiemployer pension plans. Congress for reasons of "efficiency" expressly sought to limit employers' ability to defend against such assessments by insulating them through a presumption of correctness. The Act thus places extraordinary decisionmaking power in the hands of a private party with statutory duties and individual interests that are inconsistent with an impartial determination.

The Act's procedural requirements obstruct an employer's ability to obtain a fair, impartial, and objective assessment of his liability. The initial determination is given to the party that will receive the money, the pension fund. The fund trustees have a statutory duty to act solely in the interests of the fund's beneficiaries, and are subject to lawsuit if they fail to do so. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329-30 (1981); 29 U.S.C. § 186(c)(5) (1982); 29 U.S.C. § 1132 (1982). The trustees are private parties, not appointed by the

government nor directly regulated by the government in the withdrawal liability determination. Half the trustees represent employers staying in the fund, whose economic interests conflict with employers withdrawing from the fund, because the more money "stayers" collect from the "withdrawers," the more the "stayers" reduce their own future liabilities. The other half of the trustees represent the union, whose interest is in obtaining the most money from withdrawing employers for the benefit of the employees they represent. This partisan representation is legally mandated. *See* 29 U.S.C. § 186(c)(5) (1982).

The statute gives the trustees broad discretion to put this systemic bias into effect. The trustees have the power to determine whether statutory exemptions and definitions apply, choose the actuary who will develop the actuarial assumptions to be used in calculating liability, and oversee the actuary's decisions.

The trustees' decision is then shielded in the review process, where the determination resulting from systemic bias is presumed correct both before the arbitrator and in subsequent judicial review. The express purpose of the presumption is to limit an employer's ability to defend himself and aid an outcome favorable to the pension fund.

The system does not provide either "a neutral and detached judge in the first instance," *Ward* v. *Village of Monroeville*, 409 U.S. 57, 61-62 (1972), or *de novo* review by an impartial and distinterested tribunal, *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980). The Act violates both the reality and the appearance of justice guaranteed by the due process clause.

ARGUMENT

I. THE TRUSTEES OF THE PLAN ARE INSUFFICIENTLY "NEUTRAL AND DETACHED" TO PERMIT THEM DECISIONMAKING POWER OVER AN EMPLOYER'S WITHDRAWAL LIABILITY.

Due process requires an impartial decisionmaker: "That officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule." *Tumey* v. *Ohio*, 273 U.S. 510, 522 (1927). The principle is deeply rooted in Anglo-Saxon jurisprudence. The Magna Charta had a number of provisions designed to protect against tribunals biased in favor of the King. *See* Magna Charta ¶¶ 18, 19, 24, 38, 39, 45, 52, *reprinted in* 1 Del. Code Ann. at 1, 4-7 (1975).[9] English jurists consider the right to an unbiased decisionmaker one of the two elements of "natural justice." Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1269 n.10 (1975). Blackstone held that "tyrranical partiality of judges, justices, and other magistrates, in the administration and under the colour of their office" constituted a "crime of deep malignity." 4 W. Blackstone, Commentaries *140. Judge Friendly concluded that this Court's cases establish an unbiased tribunal as one of the three minimum criteria for due process. 123 U. Pa. L. Rev. at 1278-79.

In determining whether a decisionmaker is biased, there initially is a presumption of impartiality. *Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982). The presumption "can be rebutted by a showing of conflict of interest or some other specific reason for disqualification." *Id.*

To rebut the presumption, the appellees here need only show that the decisionmaker is potentially subject to such

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[9] For example, paragraph 24 of the Magna Charta provides: "No sheriff, constable, coroner, or other [of] our bailiffs, shall hold pleas of the Crown." Paragraph 45 provides: "We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it."

disqualifying interests, not that the decisionmaker was actually biased.[10] *Aetna Life Ins. Co.* v. *Lavoie*, 106 S. Ct. 1580, 1587 (1986) (Court not required to decide whether decisionmaker "in fact . . . was influenced" by possible temptation to bias); *In re Murchison*, 349 U.S. 133, 136 (1955) (no need to show "actual bias"). Disqualifying interests can be pecuniary, *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Tumey* v. *Ohio*, 273 U.S. at 523, or can occur where the combination of statutory duties with the quasi-judicial function may create the "possible temptation" for the decisionmaker to render his decision for partisan reasons, *see Ward* v. *Village of Monroeville*, 409 U.S. at 60.

Pension plan trustees determine in the first instance an employer's withdrawal liability. That determination cannot be presumed impartial under the application of the foregoing principles. The trustees are private parties with both statutory and individual interests that conflict with an unbiased determination of withdrawal liability.

A. The Trustees Are Biased as a Matter of Law.

As noted by the court of appeals, "all of the trustees, including those selected by employers, are fiduciaries of the fund, 29 U.S.C. § 1002(21)(a), and thus owe an *exclusive* duty to the fund." JS 22a (emphasis in original). This Court emphasized in *NLRB* v. *Amax Coal Co.*, 453 U.S 322, 329-30 (1981) (citations omitted):

> Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties. To deter the trustee from all tempta-

[10] Because the question is the existence of systemic disqualifying interests, not actual bias in the individual case, evidence from pension funds other than the party in this case appropriately can be considered to show the kinds of pressures that can affect trustees and to illustrate other aspects of the statutory scheme. This brief therefore presents such material where it may aid the Court in assessing the statute.

> tion and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

The trustees' fiduciary duty under ERISA is "'*more* exacting [than] the requirements of the common law of trusts relating to employee benefit trust funds.'" *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 105 S. Ct. 3085, 3098 n.17 (1985) (Brennan, J., concurring) (emphasis in original) (quoting *Donovan* v. *Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)). Senator Williams, a co-sponsor of both ERISA and the MPPAA, emphasized that ERISA imposes "strict fiduciary obligations on those who exercise management or control over the assets or administration of an employee pension or welfare plan." 120 Cong. Rec. 29,929 (1974). Trustees are personally liable to the fund for breach of these "strict fiduciary obligations." 29 U.S.C. §§ 1109, 1132 (1982); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 105 S. Ct. at 3098-90 & n.8.

This legal framework ensures that trustees exercise every effort to maximize the assets available to a pension plan, including decisions regarding withdrawal liability. The legislative history demonstrates that Congress expected pension plans, in enforcing the withdrawal liability provisions, to act as ordinary litigants concerned with "maximizing the total ultimate recovery":

> We do not intend to restrict plan sponsors' prudent exercise of judgment in administering the withdrawal liability provisions generally. It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with maximizing the total ultimate recovery at supportable costs.[11]

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[11] 126 Cong. Rec. 23,288 (1980) (statement of Senator Williams, MPPAA co-sponsor).

Congress thus contemplated that plan trustees, as a consequence of their fiduciary duties, would act to maximize liability.[12] Individuals with such statutory duties cannot be presumed impartial in making quasi-judicial decisions. *See Schweiker* v. *McClure*, 456 U.S. 188, 195 (1982).

While Congress did state that failure to maximize withdrawal liability is not a per se violation of fiduciary duty,[13] the very fact that it can be a violation at all renders the trustees' decision something other than "neutral and detached." This Court has concluded that fear of lawsuit can improperly interfere with judicial decisionmaking. *Stump* v. *Sparkman*, 435 U.S. 349, 363-64 (1978); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 646, 649 (1872). By the same token, a private party that *is* subject to lawsuit for his decisions cannot be presumed to act without considering the personal consequences.

The appellants argue that trustees in some instances may deem a reduction of liability in the fund's interest. PBGC Brief at 33-34; Plan Brief at 21. The constitutional standard is impartiality, however, and the speculative possibility that systemically partial trustees may nonetheless sometimes reduce liability does not meet that standard. As the court of appeals concluded, the speculation that "manifest bias will not always result in gross injustice to employers" does not save the statutory scheme:

> "It seems an odd principle to determine the permissibility of manifest bias by weighing the decision-

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[12] The appellant Plan, though arguing that trustees are not "inevitably biased," Plan Brief at 19, acknowledges that "trustees are obligated by Congress to be biased in favor of pension plans," *id.* at 30.

[13] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 67, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2935.

maker's conflicting interests in the scale of justice and finding which side predominates." [14]

All else being equal, more money is better than less money when viewed from the perspective of the trustees' statutory duty. This statutory interest conflicts with a neutral determination of employer withdrawal liability.

B. The Trustees of a Pension Plan Have Individual Interests Inconsistent with a Neutral and Detached Determination.

By law, employers and employees must be "equally represented" in the administration of the pension fund. 29 U.S.C. § 186(c)(5) (1982). The dual role of both employer and employee trustees has inherent conflicts that preclude impartial withdrawal liability determinations.

1. *Employer Trustees.* Employer trustees necessarily represent companies who are not withdrawing from the fund. Because any increase in withdrawal liability will decrease the need for additional contributions from companies that do not withdraw, representatives of the staying companies have a conflicting pecuniary interest when they determine the liability of a withdrawing employer. That pecuniary interest should bar a statutory role as decisionmaker. *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) ("[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.").

The PBGC itself has acknowledged that the interests of staying employers are "materially different" from those of withdrawing employers. In responding to comments on its proposed arbitration provisions, the PBGC rejected a commenter's suggestion that arbitrators be

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[14] JS 23a (quoting *Keith Fulton & Sons, Inc.* v. *New England Teamsters Pension Fund, Inc.*, 762 F.2d 1137, 1149-50 (1st Cir. 1985) (Aldrich, J., dissenting)).

"preselected" before the initiation of arbitration. The PBGC stated that "the arbitrator would, in practice, almost always be imposed unilaterally by the plan sponsor [*i.e.*, plan trustees], a result entirely contrary to the PBGC's mandate to devise 'fair and equitable' procedures." 50 Fed. Reg. 34,679, 34,680 (1985). The PBGC further stated: "[T]here is no feasible means by which an arbitrator could be preselected by representatives of both the plan sponsor and the employers that will withdraw in the future (*whose interests are materially different from those of the employers who will not withdraw*)." *Id.* (emphasis added).

The PBGC's finding rebuts the Plan's claim that "trustees do not have any personal, financial stakes in the determination of withdrawal liability." Plan Brief at 22 n.12. The PBGC has already recognized that employer trustees have interests materially different from withdrawing employers, and recognized that these interests preclude employer trustees from making decisions implicating the fairness of the procedures under the MPPAA.

2. *Employee Trustees.* Employee trustees typically are leaders of the union that sponsors the pension plan. As such, the union trustees have every interest in obtaining the maximum amount of money for the benefit of their members from the non-withdrawing employer and no interest in treating neutrally the company that will no longer be employing those members. Moreover, union trustees have an adversarial, and sometimes antagonistic, relationship with the employers with whom they deal.

Here, for example, one of the two union trustees is John P. Morris, who at all material times also has served as Secretary-Treasurer of Local 115.[15] Mr. Morris signed

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[15] The other union trustee, James Smith, appears to be subordinate to Mr. Morris within Local 115. *See Radio Electric Service Co.*, 278 N.L.R.B. No. 78, ALJ Decision at 3 (1986).

on behalf of Local 115 the collective bargaining agreement with Yahn in 1980 that subsequently served as the basis for the imposition of withdrawal liability. Mr. Morris is also president of Teamsters Joint Council 53 and "is widely regarded as the most powerful union leader in Pennsylvania."[16]

Mr. Morris has held his position with Local 115 for a number of years. *See Fuchs* v. *Local 115, International Bhd. of Teamsters*, 427 F. Supp. 742, 744 (D. Conn. 1977); *Samoff* v. *Teamsters Local 115*, 338 F. Supp. 856, 862 (E.D. Pa. 1972).[17] Under Mr. Morris' leadership, the local's activities have involved the confrontational, combative, and sometimes bitter relations with employers not uncommon in the union-management arena, especially in the trucking industry. *See, e.g., Samoff* v. *Teamsters Local 115*, 338 F. Supp. at 861 (unlawful recognitional picketing by Local 115 "accompanied by threats, epithets and violence directed to the Company's management"); *Radio Electric Service Co.*, 278 N.L.R.B. No. 78, ALJ Decision at 2-4 (1986) (strike and unfair labor practice charges by Local 115 over employer failure to pay Christmas bonus); *Teamsters Local Union No. 115*, 224 N.L.R.B. 388 (1976) (unlawful recognitional picketing after decertification by company employees).

Perhaps Mr. Morris can put aside a lifetime of adversary relations with employers and become "neutral and detached" when making decisions as a trustee relating to employer withdrawal liability. But there is no basis for presuming so. The "possible temptation" to act for partisan reasons is the relevant inquiry. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972). Such a

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[16] Collins, *Union Eyes Staff at Penn*, Philadelphia Inquirer, Mar. 1, 1986, at B5.

[17] For a general description of Mr. Morris' career, see Fleeson, *The Toughest, Meanest Union Boss in Town*, Philadelphia Inquirer Magazine, Sept. 4, 1983, at 10.

temptation exists here. Because withdrawal liability usually represents the last opportunity to obtain money from an employer for the benefit of employees, one can only assume that a loyal union advocate would seek the highest amount.

The concern about lack of union trustee impartiality is compounded when the union trustees are involved in the underlying events that lead to the assessment of withdrawal liability. Withdrawal liability is one of the most significant clubs in the union arsenal in contract negotiations, because the liability is triggered if an employer is permanently unable to conclude a new contract. Union leaders who are also union trustees wield that club and may be tempted to do so for partisan reasons unrelated to plan management.

The series of cases involving T.I.M.E.-DC, Inc. ("TIME-DC"), a nationwide trucking company, demonstrate that this concern is not speculative. TIME-DC refused in 1982 to sign the National Master Freight Agreement because it needed economic relief in order to survive non-union competition fostered by the deregulation of the trucking industry. A strike ensued, and the company remains without a contract for many of its drivers. Despite the continued pendency of a labor dispute forestalling withdrawal liability, *see* 29 U.S.C. § 1398(2) (1982), several pension funds made withdrawal liability assessments and the company was forced to obtain injunctions against the claims.[18] The PBGC has acknowl-

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[18] *See T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund*, 597 F. Supp. 256 (D.D.C. 1984), and 616 F. Supp. 400 (D.D.C. 1985); *T.I.M.E.-DC, Inc.* v. *New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621 (N.D.N.Y.), *aff'd per curiam*, 735 F.2d 60 (2d Cir. 1984); *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.*, 560 F. Supp. 294 (E.D.N.Y. 1983).

If TIME-DC did permanently cease business, it would have an estimated total withdrawal liability of approximately $30 million

edged that these cases involved "assessments of withdrawal liability that the courts perceived as arbitrary at best and outrageous at worst." [19] Brief of *Amicus Curiae* PBGC at 8, *Central States, Southeast and Southwest Areas Pension Fund* v. *T.I.M.E.-DC, Inc.*, No. 86-1628 (5th Cir., filed Nov. 14, 1986).[20] In at least one of these cases, the plan trustees who made or permitted these "arbitrary at best and outrageous at worst" assessments were also union leaders involved in the collective bargaining relationship with TIME-DC,[21] and the motivation to pressure or punish TIME-DC with respect to its collective bargaining position is apparent in all the cases.

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owed to 27 multiemployer funds. *T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund*, 597 F. Supp. at 264.

[19] One court described the assessment before it as "inconsistent and irrational." *T.I.M.E.-DC, Inc.* v. *I.A.M. National Pension Fund*, 616 F. Supp. at 404.

The TIME-DC saga continues. In the past year, TIME-DC has been forced to obtain two additional injunctions, against the Central States Fund and against the Western Conference of Teamsters Fund. *See Central States, Southeast and Southwest Areas Pension Fund* v. *T.I.M.E.-DC, Inc.*, 639 F. Supp. 1468 (N.D. Tex. 1986); *T.I.M.E.-DC, Inc.* v. *Western Conference of Teamsters Pension Trust Fund, Inc.*, 7 Employee Benefits Cas. (BNA) 2124 (N.D. Cal. Sept. 5, 1986).

[20] The PBGC's acknowledgement there of trustee abuse of the withdrawal liability power contrasts sharply with its effort in this case to picture trustees as mere extensions of congressional will: "[I]t was entirely reasonable for Congress to entrust plan trustees and actuaries with certain legislative, policymaking functions in order to take advantage . . . of the trustees' institutional commitment to foster the statutory goals that led Congress to enact the MPPAA in the first place . . . ." PBGC Brief at 30.

[21] *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.*, 560 F. Supp. at 297 & n.1. For example, Salvatore Provenzano served on the Board of Trustees of the Local 560 Fund, was President and Chief Executive of Local 560, and served on the Teamsters National Freight Negotiating Committee. *Id.*

Union trustees hold " 'two practically and seriously inconsistent positions.' " *Ward* v. *Village of Monroeville*, 409 U.S. at 60 (quoting *Tumey* v. *Ohio*, 273 U.S. at 534). Such trustees are like the judge in *Offutt* v. *United States*, 348 U.S. 11, 17 (1954), who violated due process by ruling on an attorney's conduct in a contempt proceeding while "personally embroiled" in the underlying controversy. Just as that judge was not deemed "to represent the impersonal authority of law," *id.* at 16, so also union trustees cannot be deemed impersonal adjudicators of the liability of employers with whom they have adversarial relations.

C. The Private Character of the Trustee Position Further Underscores the Lack of Fitness to Act as Statutory Decisionmakers.

Pension fund trustees are private individuals, not government officials. Trustees are appointed and removed without government oversight, examination or regulation beyond the cumbersome vehicle of enforcement litigation. There is thus even less reason than in *Ward* or *Schweiker* v. *McClure*, where government officials were involved, to have confidence that they can act as impartial decisionmakers uninfluenced by personal considerations.

The unseemly history of multiemployer pension funds and their ties to organized crime underscores the dangers inherent in granting private individuals quasi-judicial powers. As Judge Irving Kaufman has found in his role as Chairman of the President's Commission on Organized Crime: "Traditionally, labor racketeering evoked images of relatively simple and direct extortion imposed by threats of strikes or physical force. *Today, however, it is just as likely to appear in the form of benefit fund manipulation* facilitated by the assistance of corrupt professionals such as lawyers, accountants, and bankers." [22]

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[22] Prepared Statement of Judge Irving R. Kaufman, *reprinted in* President's Commission on Organized Crime, *Organized Crime and*

The most documented example of organized crime domination of a pension fund involves the Central States Fund, which was the subject of extensive government investigations. One Commissioner of the President's Commission on Organized Crime stated on the record that for many years "the Central States Pension Fund was known within law enforcement circles and other circles as well, as the private bank of organized crime." [23] The Fund "loaned money to and invested in organized criminal endeavors." [24] The Fund and its trustees allegedly funneled hundreds of millions, perhaps billions of dollars to organized crime,[25] accounting at least in part for the Fund's huge unfunded liability of over $3 billion. Four of the Fund's former trustees have been

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Labor-Management Racketeering in the United States, Record of Hearing VI, at 650 (Apr. 22-24, 1985) (emphasis added) [hereinafter *Organized Crime Commission Record*].

[23] *Id.* at 609 (statement of Commissioner Manuel).

[24] *See Findings and Conclusions*, H.R. Rep. No. 177, 97th Cong., 1st Sess. 181 (1981).

[25] Details of the links between Central States and organized crime have been the subject of frequent government investigations. In the five-year period from 1976 to 1981 no fewer than eight congressional hearings were held concerning Central States' alleged misuse of funds to benefit organized crime. *See* Comptroller General of the United States, *Investigation To Reform Teamsters' Central States Pension Fund Found Inadequate*, app. IX, at 145-46 (GAO/HRD-82-13, Apr. 28, 1982). Those hearings included: *Investigation of Alleged Irregularities in the Operation of the Teamsters' Central States Pension Fund: Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. (July 1, 1976); *Federal Pension Law Enforcement in Case of Teamsters' Central States Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (Mar. 14 & 15, 1977); *Federal Pension Law Enforcement in Case of Teamsters' Central States Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (Apr. 5 & July 19-20, 1977); *The Teamsters' Central States Pension Fund: Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 1st Sess. (July 18-19, 1977); *Central States*

convicted, *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 687 n.7 (7th Cir. 1986) (en banc), and the Fund is being operated pursuant to two consent decrees entered in the United States District Court for the Northern District of Illinois.[26]

The problem of corruption and malfeasance in multi-employer funds is not limited to Central States. For example, according to the Annual Report to Congress of the Pension and Welfare Benefits Administration for 1984—the latest available report—the Secretary of Labor filed suit that year against twelve union-sponsored employee benefit funds or their trustees for various acts of mismanagement and misuse of assets. The Secretary that year obtained court judgments, consent decrees, or criminal convictions against another seven funds or their trustees.[27]

The current executive director of Central States, who led the clean-up of the Fund, has cautioned that, because of lack of regulation, organized crime involvement in pension funds can be expected to continue: "[W]hen you find large blocks of money like this generally unregulated with not [sic] on-site examinations, the organized crime elements, the unsavory elements in this country

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Teamsters' Fund: Subcomm. on Oversight of the House Comm. on Ways and Means, 95th Cong., 2d Sess. (Mar. 22, 1978); *Central States Teamsters' Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. (July 17-18, 1978); *Central States Teamsters' Pension Fund: Subcomm. on Oversight of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. (Mar. 24, 1980); *Teamsters' Central States Pension Fund: Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. (Aug. 25-26 & Sept. 29-30, 1980).

[26] *Organized Crime Commission Record* at 589-90 (testimony of George Lehr).

[27] *See* Pension and Welfare Benefits Administration, U.S. Dep't of Labor, *Employee Retirement Income Security Act, 1984 Report to Congress* at 3-9.

are going to pounce on them and they are going to be there." [28]

II. THE ACT GIVES TRUSTEES FULL POWER TO EFFECTUATE THEIR BIAS.

The foregoing discussion has shown that plan trustees cannot be deemed unbiased for purposes of performing a quasi-judicial decisionmaking role. The PBGC argues that nonetheless the calculation of withdrawal liability is essentially ministerial and that the trustees have no ability to put their bias into effect. An examination of a plan's powers under the Act demonstrates the contrary. The plan trustees have wide latitude to effectuate their bias both in the application of the statute and in determining the assumptions necessary for the calculation of withdrawal liability.

A. The Plan's Ability to Determine Whether to Apply Statutory Exceptions Gives Trustees the Power to Expand or Reduce Withdrawal Liability.

The numerical calculation of withdrawal liability is only a small part of the determination, as actuaries themselves have noted.[29] The presumption of correctness

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[28] *Organized Crime Commission Record* at 599. Mr. Lehr similarly stated on camera in a recent televised news report on benefit fund abuse: "[I]t's not only the least regulated, it's the most abused body of money that exists in this country today. . . . The mobsters, the scumbags, the rip-off artists, what those people do is look for something where there is not good regulation, and they have found this area where there is not good regulation." *ABC World News Tonight* (Dec. 29, 1986). In that same report, a Labor Department spokesman stated on camera: "You have corrupt trustees and administrators, people with hoodlum affiliations managing these funds. . . . The size of the problem simply overwhelms those who are charged with conducting enforcement responsibilities." *Id.*

[29] In a Report by the Academy Task Force to the House Task Force considering the proposed legislation, the American Academy of Actuaries stated: "The manner of allocating the total unfunded

that was declared unconstitutional by the court of appeals applies to "any determination . . . under sections 1381 through 1399 of this title and section 1405." 29 U.S.C. § 1401(a)(3)(A) (1982). Among the factual matters potentially determinable under these sections are:

—whether a withdrawal has occurred, *i.e.*, whether an employer has "permanently cease[d]" having an obligation to contribute or "permanently cease[d] all covered operations." *Id.* § 1383(a).

—whether one of the industry exemptions applies (construction, entertainment, trucking, retail food). *Id.* §§ 1383(a)-(d), 1385(c).

—whether compliance with the sale of assets provision has been met, to protect such a sale from the imposition of withdrawal liability. *Id.* § 1384.

—whether there has been a "contribution decline" or a "partial cessation of the employer's contribution obligation," sufficient to trigger a partial withdrawal. *Id.* § 1385(a).

—whether a change in business form is to be considered a withdrawal. *Id.* § 1398(1).

—whether a sale of assets not complying with § 1384 reduces liability, and what the "liquidation or dissolution value" of the employer is for purposes of calculating the reduction. *Id.* § 1405(a).

—whether the liabilities of the employer exceed its assets, for purposes of applying the liquidation or dissolution provision. *Id.* § 1405(d).

That the presumption applies to factual determinations, rather than legal determinations,[20] only begs the

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vested liability to individual employers is not strictly an actuarial matter except in the details of calculation." *Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare & Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education & Labor*, 96th Cong., 2d Sess. 1503 (1979).

[20] The PBGC notes that it has concluded that the presumption does not apply to questions of law. *See* PBGC Brief at 39. The

question. A fund has tremendous discretion in individual cases to determine that an exception or provision does or does not apply, even when it does not have access to information that permits it to make an informed determination. This individualized, case-specific decision

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PBGC fails to note that under its arbitration rules the arbitrator need not distinguish between findings of fact and conclusions of law, 29 C.F.R. § 2641.7(a)(1) (1986), thus permitting confusion and argument as to the extent to which the presumption influences an award.

Section 2641.7(a)(1) was added at the behest of the organization that represents multiemployer plans, which argued that if arbitrators were enjoined to separate fact and law, "[t]he practical result . . . might be to eliminate the effect of the statutory presumption in many cases." *Comment Letter to Office of General Counsel, PBGC, from Robert A. Georgine, Chairman, National Coordinating Committee for Multiemployer Plans* at 10 (Sept. 6, 1983) (on file with PBGC).

Thus, while claiming to the Court that the effect of the presumption is limited because "many of the trustees' decisions concerning the applicability of exemptions will be subject to de novo review," JS 21, the PBGC appears to be taking administrative steps to reduce that likelihood.

It should also be noted that pension funds have not universally adopted the PBGC's position that the presumption only applies to factual determinations. In *I.A.M. National Pension Fund* v. *Cooper Industries, Inc.*, 635 F. Supp. 335 (D.D.C. 1986), the district court found that there were no facts in dispute and that the Fund's assessment was invalid as a matter of law. The Fund on appeal argued, *inter alia*, that the district court erred in not applying the presumption to the Fund's legal determination:

> Presumably because the court viewed the challenge raised by Cooper as raising a pure legal question, it conducted a *de novo* determination of that question. . . . Cooper was not entitled to prevail in the court below unless it overcame the presumption of correctness which the statute accords the Fund's withdrawal liability determination.

Brief of Appellants at 19, *I.A.M. National Pension Fund* v. *Cooper Industries, Inc.*, No. 86-7015 (D.C. Cir., filed Jan. 22, 1987).

can eliminate withdrawal liability altogether or impose liability without a proper basis.[31]

The potential for abuse is shown in the case law. In *T.I.M.E.-DC, Inc.* v. *New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621 (N.D.N.Y.), *aff'd per curiam*, 735 F.2d 60 (2d Cir. 1984), the Fund demanded withdrawal liability despite the company's demonstration that a labor dispute existed. The court found that one trustee misunderstood the relevant law and "at the very most none of the other Trustees was anything more than vaguely familiar with the labor dispute provision of the MPPAA." *Id.* at 625 & n.6.[32] Similarly, in *T.I.M.E.-DC, Inc.* v. *Trucking Employees of North Jersey Welfare Fund, Inc.*, "the Trustees had not heard of the 'labor dispute' exception to the MPPAA before their preparations for testimony." 560 F. Supp. 294, 299 (E.D.N.Y. 1983). Yet, had either assessment gone to arbitration, any factual component of the implicit "determination" that no labor dispute existed would have been presumed correct.

There is no basis in law or policy to shield such decisions from *de novo* review.

B. The Calculation of Withdrawal Liability Is Not a Ministerial Act, but Rather Has Discretionary Elements That Grant a Fund Broad Leeway to Maximize Liability.

The statute permits a fund broad discretion in the assumptions and data employed in the calculation of withdrawal liability, and the calculation is thus far

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[31] The importance of fund power to apply statutory provisions is underscored by the PBGC's efforts to persuade the Court to ignore that power in evaluating the statutory scheme. *See* PBGC Brief at 38-39.

[32] The court also noted that "it appears that some trustees were wholly ignorant of why the Fund asserted withdrawal liability against TIME-DC." *Id.* at 625 n.6.

from ministerial. A fund may use any actuarial assumptions and methods, so long as they "in the aggregate, are reasonable." 29 U.S.C. § 1393(a)(1). The PBGC cannot require a fund to use any particular assumptions or methods. *Id.* § 1393(a). A fund need not obtain complete data, but rather may "rely on the data available or on data secured by a sampling which can reasonably be expected to be representative of the status of the entire plan." *Id.* § 1393(b)(2). These provisions permit wide variation among funds in the actuarial determinations.

The General Accounting Office's ("GAO") Report to the Congress, *Effects of Liabilities Assessed Employers Withdrawing From Multiemployer Pension Plans* (GAO/HRD-85-16, Mar. 14, 1985) [hereinafter *Effects of Liabilities*] confirms the extent of potential actuarial variation and indicates a critical view of the consequent possibility of inequitable liability assessments. The Report notes that assumptions can vary significantly among actuaries, yet "[*n*]*otwithstanding the variables inherent in the determination of a plan's withdrawal liability*, MPPAA provides that a plan's determination is presumed correct in disputes resulting in arbitration unless the employer can show that it is unreasonable or in error." *Id.* at 24 (emphasis added). The Report concludes:

> Notwithstanding the appropriateness of different actuarial assumptions for different plans, the calculations of a plan's unfunded actuarial liability involves considerable judgment by the actuary concerning future uncertainties. *Because of such uncertainties, the actuary's estimates of future returns on a plan's investments could result in determinations of liabilities that could be inequitable to the withdrawing employers.*[33]

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[33] *Id.* at 33 (emphasis added).

The potential for inequitable determination [34] identified by the GAO is especially severe because the determination is unalterable. Once an employer's withdrawal liability is calculated, there is no provision for changing the liability even if the fund's assumptions later prove in error.[35]

Actuaries themselves confirm the complexity of the withdrawal liability calculation and the potential variation in liability based on the assumptions used. The senior actuarial advisor on the policy and planning staff of the PBGC has noted "unanswered questions," "potential sources of controversy," and "theoretical incongruities" in the calculation of withdrawal liability.[36] Just how indefinite actuarial science can be is shown by the following excerpt from his article:

> Are the assumptions used to establish the charges and credits for the funding standard account appropriate for calculating the [value of vested benefits]? *Maybe.*[37]

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[34] Appellants argue that the fact that the selection of assumptions applies to all withdrawing employers supports the statutory scheme. PBGC Brief at 26-28; Plan Brief at 24-26. If the choice of assumptions leads to inequity to all withdrawing employers, it is hard to see how that is somehow better than inequity only to a particular employer.

[35] Feuer, *The Selection and Arbitration of Withdrawal Liability Interest Rates*, Employee Benefits J., Mar. 1985, at 23, 26 ("An employer's withdrawal liability is calculated once and not adjusted if subsequent events demonstrate that the underlying actuarial assumptions and methods were incorrect.").

[36] Amoroso, *Withdrawal Liability*, Employee Benefits J., June 1982, at 2, 4, 26.

[37] *Id.* at 4 (emphasis added). Funding assumptions are those assumptions used by the plan to estimate long-term contribution needs. *See* 29 U.S.C. § 1082 (1982) (ERISA minimum funding standards). The question of whether to use funding assumptions for purposes of determining withdrawal liability is one of the most critical in terms of the impact on the final amount, and, as

What is "maybe" appropriate to this actuary will nonetheless be "presumed correct" if enshrined in a plan's withdrawal liability assessment.

The PBGC's actuarial advisor concludes:

> Determining an employer's withdrawal liability is a complicated business, which is not exclusively in the technician's domain. Indeed, one of the purposes, here, was to underscore that point of view. "Theoretical" tradeoffs may be necessary to achieve equitable results envisioned by Subtitle E of Title IV; focusing exclusively on any one factor may not be appropriate.[28]

Thus, far from being a purely ministerial task, the actuary's determination involves sensitive and complicated questions of trade-offs, "not exclusively in the technician's domain." *See also* Brennan, *Multiemployer Plan Withdrawal Liability: An Actuary's View*, Pension World, Oct. 1982, at 41, 44 ("The actuary's role under MEPPAA is a difficult and precarious one.").

Because the actuary is retained by the plan, any discretionary trade-offs will usually be resolved in the plan's favor. If not, the plan is free to change actuaries or to employ its own actuarial assumptions.

The GAO Report *Effects of Liabilities* again demonstrates the extent of a plan's power. Perhaps the most important actuarial assumption is the interest rate assumed for calculating the future return on plan invest-

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noted by the PBGC's actuarial adviser, one of the areas most open to actuarial judgment. The PBGC noted to the GAO that "[b]ecause the assumptions used for plan funding calculations tend to err on the side of conservatism, these calculations may overstate unfunded vested liabilities." *Effects of Liabilities* at 72. To the Court, however, the PBGC claims that use of funding assumptions by two-thirds of pension funds is not evidence of bias. PBGC Brief at 28 n.20.

[28] *Id.* at 6.

ments. Actuaries have advocated five different types of interest rates,[39] and a plan's unfunded vested benefits can vary dramatically according to which is used. The GAO Report found a one percent change in the interest rate could change the value of vested benefits by eight to ten percent. The Report provided an example of one fund whose unfunded vested benefits went from $7,000,000 to $0 based on the interest rate used. *Id.* at 24, 29. The Report further noted: *"The [interest] rate may depend on the philosophy of the actuary or actuarial firm employed by the plan or on a decision of the plan's trustees."* *Id.* at 24 (emphasis added).

The PBGC has confirmed that plan trustees have the final say over the actuarial assumptions used in the withdrawal liability calculation. In the preamble to its proposed arbitration rules, the PBGC stated: "[T]he joint board of trustees as plan sponsor of a multiemployer plan shall approve the actuarial assumptions upon which the plan's liabilities are calculated, including assumptions relating to mortality, interest, turnover, and administrative expenses." 48 Fed. Reg. 31,251, 31,252 (1983).

A memorandum produced in a different case demonstrates the interdependent relationship of a pension fund and its actuary and explodes the fiction propounded by appellants that the actuary "is a neutral decisionmaker." Plan Brief at 25; *accord* PBGC Brief at 36. An actuary with Martin E. Segal & Co., a major firm that is the consulting actuary for approximately one-quarter of all multiemployer plans,[40] wrote one of its clients, the Board of Trustees of the Marine Mates and Pilots ("M.M. &

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[39] Harrold, *Withdrawal Liability—Which Interest Rate to Use*, Int'l Found. of Employee Benefits Digest, June 1985, at 6, 6. The author identifies the rates as market rates, insurance company annuity purchase rates, PBGC rates, blended rates, and funding rates. The author further notes: "Combinations of these, of course, are possible." *Id.*

[40] *Effects of Liabilities* at 72.

P.") Pension Fund, concerning withdrawal liability. The actuary "urge[d] that we meet in the near future with Counsel and your Administrator to explore the procedures and substantive matters concerning the determination and collection of any withdrawal liability that can be presented to the Trustees for decision at your scheduled meeting next month." [41]

The actuary's suggested agenda of the matters to be "presented to the Trustees for decision" was as follows:

1. Notification required to all contributing employers.
2. Information to be provided on request—fees to be charged, if any.
3. Definition of "Withdrawal."
4. Identification of "employer" for withdrawal purposes (companies under "common control").
5. Calculation and collection of an employer's liability.[42]

There is certainly nothing improper about an actuary working with his client and seeking approval on major decisions regarding the withdrawal liability calculation. Indeed, it is entirely expectable. Nothing in the statute or in the economic relationship between a fund and the actuary makes the actuary anything other than what he normally is: the agent of his client.[43] Such an agent

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[41] Memorandum from Philip B. Polak to Board of Trustees, M.M. & P. Pension Fund (Apr. 8, 1981) (reproduced herein as Appendix B) (produced by Pension Fund in discovery in *In re Arbitration between Marine Transport Lines, Inc. & M.M. & P. Pension Fund*, No. 13621001085 (MEPP)).

[42] *Id.*

[43] The PBGC notes that an actuary may be suspended if he fails to discharge his duties under ERISA. 29 U.S.C. § 1242(b)(1) (1982); *see* PBGC Brief at 36 n.27. The evaluations of the PBGC's actuary and the GAO's *Effect of Liabilities* discussed before demon-

cannot, consistent with due process, be deemed a "neutral decisionmaker" of the fund's liability assessment.

Funds are free to shop for the actuaries whose "philosophy" best fits their own [44] and to make decisions on the major elements of the liability calculation. But the employer is not permitted effectively to challenge either selection.

C. The Fund's Decision Is Adjudicative in Nature, Not "Legislative Policymaking."

Withdrawal liability in its simplest terms is a statutorily created debt,[45] a congressional mandate authoriz-

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strate that there is sufficient discretion under the statute to vary withdrawal liability significantly without running afoul of that provision. Indeed, given the trustees' duty to "be biased in favor of pension plans," Plan Brief at 30, an actuary arguably would run afoul of the statute if he did not make discretionary trade-offs in the plan's favor.

[44] The extent of the variation that can occur in actuarial assessment and the potential for "actuary-shopping" is illustrated by the different results the Central States Fund obtained from three actuarial firms during the period 1975-1977. The range of the dispute is perhaps best communicated by the GAO headings in its Report on this subject:

"First actuary indicated the Fund is financially sound."

"Second actuary states Fund is financially unsound."

"First actuary disagrees and states that IRS agrees the Fund is financially sound."

"Third actuary agrees with second that the Fund is not financially sound."

Comptroller General of the United States, *Investigation to Reform Teamsters' Central States Pension Fund Found Inadequate* 109-11 (GAO/HRD-82-13, Apr. 28, 1982).

[45] *See Connolly* v. *PBGC*, 106 S. Ct. 1018, 1029-31 (1986) (O'Connor, J., concurring); Statement of Sen. Williams, quoted at p. 11 *supra*.

ing the transfer of large sums of money [46] from employers to pension funds. Through their powers to resolve initially statutory exemptions and to establish actuarial methods and assumptions, pension funds determine both the existence and the amount of that debt. There is no merit to the contention that this determination involves unreviewable "policy" decisions that are "legislative" rather than "adjudicative" in nature. *See* PBGC Brief at 19, 30.

The PBGC makes a far-fetched analogy to governmental decisions that involve weighing and balancing of competing public policy interests entrusted to administrative agencies. The cases relied on are inapposite here. In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), the case involved the Department of Transportation's decision as to where to build a highway. In *Hortonville Joint School Dist. No. 1* v. *Hortonville Education Ass'n*, 426 U.S. 482, 495 (1976), the decision concerned a School Board's treatment of teachers who were admittedly on strike illegally, a matter which "was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well." Moreover, the Court noted that the Board members—unlike the trustees here—"did not . . . ha[ve] the kind of personal or financial stake in the decision that might create a conflict of interest." *Id.* at 492. *Heckler* v. *Chaney*, 105 S. Ct. 1649 (1985), involved the decision

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[46] The statutory *minimum* for withdrawal liability is $50,000, 29 U.S.C. § 1389 (1982), far in excess of the minimum amount for federal court jurisdiction. Withdrawal liability assessments running into the millions of dollars are not uncommon. *See* note 18 *supra*; *Robbins* v. *The Pepsi-Cola Metropolitan Bottling Co.*, 636 F. Supp. 641 (N.D. Ill. 1986) (over $30 million in withdrawal liability claims), *appeal pending*, Nos. 86-1963, 86-1964, 86-2241 (7th Cir.); *The Flying Tiger Line, Inc.* v. *Central States, Southeast and Southwest Areas Pension Fund*, No. 86-304 (D. Del. Oct. 17, 1986) (over $36 million withdrawal liability claims), *appeal pending*, Nos. 86-5817, 86-5931, 87-3083 (3d Cir.).

by the Food and Drug Administration not to undertake enforcement actions.[47]

These are decisions by duly appointed governmental entities in broad policymaking areas. By contrast, withdrawal liability is the determination by private trustees —elected only by other trustees—of the amount of money employers will pay to the institution the trustees manage. This concrete resolution and assessment of liability is clearly an adjudicative matter.

The PBGC's argument proves too much. The logical outcome of the argument is that there should be no review at all of fund liability determinations. However, there is very definitely "law to apply" to fund determinations. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. at 413. Far from being unreviewable "legislative, policymaking functions," [48] fund determinations are resolutions of monetary liability that should be tested through the impartial adversarial system guaranteed by due process.

III. UNDER THE STATUTORY SCHEME THE EMPLOYER AT NO POINT RECEIVES *DE NOVO* ADJUDICATION OF HIS WITHDRAWAL LIABILITY ASSESSMENT.

Due process requires that at some point a citizen has the right to a trial *de novo* before a neutral and detached decisionmaker. *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60-61 (1972); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43, 245 (1980). *Ward* held that due process requires a neutral and detached judge in the first instance, and even *de novo* review does not protect the failure to do so.

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[47] *Friedman* v. *Rogers*, 440 U.S. 1 (1979), involved no administrative decision at all, but rather involved an attack on a state legislature's policy decision regarding permissible trade practices in the guise of attacking the State Optometry Board's composition. *See id.* at 7, 17-18.

[48] PBGC Brief at 30.

409 U.S. at 61-62. *Marshall* v. *Jerrico* held that where the initial determination of liability was placed with a party with enforcement rather than judicial responsibilities trial *de novo* "of all *factual* and legal issues" preserved the statutory scheme. 446 U.S. at 245 (emphasis added); *see also Withrow* v. *Larkin*, 421 U.S. 35, 58 (1975) ("substantial due process question would be raised" if "nonadversarial processes . . . foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision").

The pension fund trustees cannot be deemed impartial, and they have the duty and the power to maximize their assessments both in general and in individual cases. The MPPAA's shielding of this ex parte determination by an interested decisionmaker from *de novo* review through the presumption of correctness completes the deprivation of due process. At no point does an employer receive the trial *de novo* before an impartial decisionmaker guaranteed by the Constitution.

A. The Presumption of Correctness Unfairly Obstructs Impartial *De Novo* Review.

The influence of the presumption can be seen in arbitrations where the presumption is applied in talismanic fashion to resolve disputed questions of fact. *See, e.g.*, *Coal Drilling Services, Inc. & UMW 1974 Pension Plan*, 5 Employee Benefits Cas. (BNA) 1833, 1835 (1984); *UMW 1974 Pension Plan & Williamson Shaft Contracting Co.*, 6 Employee Benefits Cas. (BNA) 1593, 1604 (1985); *Hertz Corp. & Commission Drivers Local 187 Pension Fund*, 4 Employee Benefits Cas. (BNA) 1367, 1380-81 (1983); *Palmer Coking Coal Co. & UMW 1950 & 1974 Pension Plans*, 5 Employee Benefits Cas. (BNA) 2369, 2383 & n.6 (1984). In *Hertz*, the arbitrator resolved the disputed issue on the basis of the presumption even though the company's position had "a certain undeniable plausibility." 4 Employee Benefits Cas. (BNA) at 1381.

The arbitrator in *Palmer Coking* described the presumption as imposing "rigorous standards of arbitral review." [49]

That arbitrators have in some instances revised plan determinations does not prove that the system is fair, only that the unfairness does not guarantee a result adverse to the employer in every case. Presumably the Mayor of Monroeville did not impose a fine in every case that came before him. The appellees do not have the burden of showing "special prejudice in [the] particular case." Such a burden would "require[] too much and protect[] too little." *Ward* v. *Village of Monroeville*, 409 U.S. at 61. Appellees need only show a systemic deprivation of a fair, *de novo* hearing. *Cf. In re Murchison*, 349 U.S. 133, 136 (1955) ("[O]ur system of law has always endeavored to prevent even the probability of unfairness.").

The unconstitutional effect of the presumption is underscored by its uniqueness. Unlike other presumptions commonly written into statutes, this is not a "presumption" at all in the evidentiary sense of linking "Fact A" to "Fact B." [50] Congress here has not legislatively de-

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[49] 5 Employee Benefits Cas. (BNA) at 2383 n.6. Compounding the effect of the arbitral presumption is the review required of the courts. In a judicial review proceeding, the arbitrator's findings of fact are rebuttable only by a "*clear* preponderance of the evidence." 29 U.S.C. § 1401(c) (1982) (emphasis added). Theoretically, an employer could prove his case by a preponderance and still lose.

[50] *See Mobile, Jackson & K.C. R.R.* v. *Turnipseed*, 219 U.S. 35, 43 (1910) (presumption in civil statute constitutional so long as there is a "rational connection between the fact proved and the ultimate fact presumed"); *see, e.g., Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (coal mining presumed to cause black lung disease); *Mathews* v. *Lucas*, 427 U.S. 495 (1976) (illegitimate child entitled to presumption of dependency on decedent parent where parent evidenced relationship prior to death); *Atlantic Coast Line R.R.* v. *Ford*, 287 U.S. 502 (1933) (failure of railroad to

termined a particular fact, but attempted to favor a particular class of private parties in the adversarial process.[51] Congress intentionally was attempting to limit an employer's ability to defend himself against a fund's assessment. Congress intended that "[w]ithdrawal liability . . . be collectible upon notice and demand to the withdrawn employer by the plan sponsor," H.R. Rep. No. 869, pt. II, 96th Cong., 2d Sess. 29, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2993, 3018, which was consistent with the congressional purpose that pension funds "maximiz[e] the total ultimate recovery," statement of Sen. Williams, quoted at p. 11 *supra*.

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give crossing signals presumed to be proximate cause of crossing collision).

[51] The appellant Plan acknowledges this congressional favoritism but attempts to defend it by arguing that there is an analogy between trustees' determinations with respect to claims for benefits by participants—which are evaluated under the deferential "arbitrary and capricious" standard—and their determinations under the MPPAA. Plan Brief at 27-29. Because the trustees' fiduciary duty runs to beneficiaries, *see NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 330 (1981), there is a legal basis for assuming that trustees will make decisions favorable to the beneficiaries absent evidence to the contrary. With withdrawal liability, trustees inherently have an adversarial relationship and such deference is therefore inappropriate.

Moreover, as the various cases cited by the Plan recognize, trustee determinations with respect to benefit claims are reviewed under the deferential arbitrary and capricious standard because they depend on the trustees' "readings of the plans they administer." *Richland Industries, Ltd.* v. *Robbins*, 617 F. Supp. 639, 646 (N.D. Ill. 1985). By contrast, withdrawal liability requires the application of a supervening statute to fact situations where the trustees may have no expertise or may have no information whatsoever. There is thus no basis for deference. *Cf. id* at 646 (principle that courts should defer to the trustees' administration and interpretation of plan rules regarding benefits "does not extend to the interpretation of statutes, a task for which trustees are scarcely suited as experts generally").

Congress instituted the presumption in the belief that it was necessary "to ensure the enforcability [sic] of employer liability," on the rationale that employers "could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element in making an actuarial determination." [52] The rationale is neither supported in the legislative history nor supportable. First, that rationale provides no basis for applying the presumption to statutory determinations, determinations that can have a greater effect on the ultimate liability of individual employers than the actuarial calculation. *See* pp. 21-24 *supra*. Second, because the employer bears his own expenses and is subject to sanctions for raising unreasonable or frivolous claims, *see* 29 C.F.R. § 2641.9 (1986), there is no greater likelihood of employer delay "nullifying" the underlying obligation than in any other kind of litigation.

More important, the very fact that there can be a range of actuarial judgments supports the conclusion that an employer should have the opportunity to present his positions to a genuinely neutral and disinterested decisionmaker uninfluenced by a congressional mandate to favor one party over another.[53] Large amounts of money

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[52] H.R. Rep. No. 869, pt. I, 96th Cong., 2d Sess. 86, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2954; *see also* Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Considerations* 20-21 (Comm. Print 1980).

[53] This is the critical point of departure for the First Circuit's *en banc* decision in *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137 (1st Cir. 1985). The court there acknowledged that "the trustees came to their task of calculating withdrawal liability with a bias," *id.* at 1140, but believed that Congress constitutionally could permit a biased determination among the range of alternatives. *See id.* at 1143-44. The court's argument confuses the due process guarantee of an impartial decisionmaker with the underlying merits question. Appellees are entitled to an impartial review of that con-

are at stake,[54] which often represent all that an employer has.

The claimed need for "efficiency" cannot outweigh the right to an impartial adjudication. There is no support in the case law for appellants' implicit assertion to the contrary. Due process is always in some sense "inefficient," but due process cannot be denied merely because the opposing party would like an easier road than a fair hearing leading to an impartial adjudication.

B. The MPPAA Procedural Scheme Violates the Perception of Justice.

The MPPAA procedural scheme, in conjunction with the underlying substantive imposition of the liability, violates the fundamental precept that "justice must satisfy the appearance of justice." *Offutt* v. *United States*, 348 U.S. 11, 14 (1954); *see also Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 594 (1980) (Brennan, J., concurring) ("For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably."). The principle of neutrality "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall* v. *Jerrico*, 446 U.S. at 242 (quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).[55] The MPPAA does not generate that feeling.

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cededly biased determination. Significantly, neither of the appellants attempts to justify the MPPAA presumption with the argument advanced by the *Keith Fulton* court.

[54] *See* note 46 *supra*.

[55] Studies have shown that the perception of procedural fairness is critically related to the presence of a "demonstrably independent decisionmaker." J. Marshaw, C. Goetz, F. Goodman, W. Schwartz, P. Verkuil & M. Carrow, *Social Security Hearings and Appeals*, at XXIV (1978); *see also* Verkuil, *A Study of Informal Adjudica-*

The employer faces a liability that can exceed his net worth. That liability is imposed by statute despite the employer's agreement in arms-length bargaining to make specified and limited contributions, and the liability can far exceed the contributions the employer agreed to make.[56] The employer did not create the plan underfunding that forms the basis of the liability, nor did he have any ability to control the decisions that led to the underfunding. *See* p. 2 *supra*. The assessed liability does not necessarily go to fund the benefits of his own employees. The employer must begin paying the liability before he even receives a resolution of the amount. 29 U.S.C. § 1399(c)(2) (1982).

The determination of this noncontractual liability is made by the trustees who *were* responsible for plan underfunding[57] and who will receive the money. Half of the trustees are former competitors with a pecuniary interest in maximizing liability to reduce their own contributions, and half are union trustees with an interest in maximizing the money available for benefits to union members. Their determination is then treated with a "presumption of correctness" for the express purpose of "dampening"[58] the employer's effort to obtain an unbiased review through the normal adversarial process.

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tion Procedures, 43 U. Chi. L. Rev. 739, 751 (1976). As the court of appeals succinctly noted, " 'even a dog distinguishes between being stumbled over and being kicked.' " JS 20a (quoting O. Holmes, *The Common Law* 3 (1881)).

[56] Here, appellees' assessed liability is almost double the contributions made in the prior five years. *See* note 8 *supra* and accompanying text.

[57] The essence of plan underfunding is the failure to match promised benefits to expected contributions, which is the responsibility of the trustees. *See Connolly* v. *PBGC*, 106 S. Ct. 1018, 1030 (1986) (O'Connor, J., concurring).

[58] *See* PBGC Brief at 44-45.

In the vivid image of Judge Aldrich, the employer

> finds himself, without possibility of relief, in a boxing ring from which he had been told he might be exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight. Although not put in exactly those terms, the justification offered for this is that it was his own fault for associating with people like that, and his opponent needs the money.[59]

Due process is really nothing more than ensuring that there is indeed a "fair fight." While many problems and controversies remain with the MPPAA, removing the presumption of correctness at least gives the employer an even opportunity to contest fund determinations, returning some sense of justice in accordance with "the deep-rooted demands of fair play enshrined in the Constitution." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. at 161 (Frankfurter, J., concurring).

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[59] *Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1146 (1st Cir. 1985) (en banc) (Aldrich, J., dissenting).

CONCLUSION

For the foregoing reasons, the appellees respectfully request that the judgment of the court of appeals be affirmed.

Respectfully submitted,

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Dated: March 9, 1987

APPENDICES

APPENDIX A

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

I. PLAN ASSETS

(A) Statement of assets as of December 31, 1980

	Book value	Market value
Cash	$ 393,063	$ 393,063
Due from investment custodian	183,850	183,850
Accrued interest on marketable securities	9,584	9,584
Government bonds	1,727,166	1,383,906
Corporate bonds	1,868,840	1,310,000
Common stock	5,270,045	5,317,530
Preferred stock	107,490	115,875
Pooled funds	273,397	273,397
Buildings and other depreciable property	23,166	23,166
Less liabilities	3,042	3,042
Total assets	$9,853,559	$9,007,329

(B) Statement of income and disbursements as of December 31, 1980

Income	
Employer contributions	$1,582,806
Withdrawal liability payments	0
Investment income	585,536
Realized gain (loss)	166,584
Unrealized appreciation	339,122
Total	$2,674,048
Disbursements	
Benefit payments	$1,033,915
Expenses	180,245
Total	$1,214,160
Net increase in assets	$1,459,888
Market value of assets as of	
January 1	$7,547,441
December 31	$9,007,329

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

II. UNFUNDED VESTED BENEFITS LIABILITY
AS OF DECEMBER 31, 1980

(A)	Vested benefits liability	
	(1) Retired participants and beneficiaries receiving payments (498)	$10,263,832
	(2) Other participants (705)	9,533,685
	(3) Total (1,203)	$19,797,517
(B)	Plan assets	$ 9,007,329
(C)	Unfunded vested benefits liability (UVB)	$10,790,188

Notes

(1) All calculations are based on the benefit level in effect on December 31, 1980.

(2) The present values shown were calculated in accordance with Interpretations 1 and 2 of the American Academy of Actuaries. The assumed investment rate of return was 6%.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

III. DEVELOPMENT OF UNAMORTIZED UNFUNDED VESTED BENEFITS LIABILITY AS OF DECEMBER 31, 1980

	Allocated to:		
	Participating Employers	Withdrawn Employers	Total
A. *Original Liability Components at 12/31/80*			
1. Unfunded vested benefits liability (UVB) at 12/31/79	$11,697,749	$ 0	$11,697,749
2. Allocations to withdrawn employers through 12/31/80	(1,582,354)	1,582,354	0
3. Changes in UVB through 12/31/80	(401,791)	0	(401,791)
4. Reallocated amounts through 12/31/80	164,821	(164,821)	0
5. Total	$ 9,878,425	$1,417,533	$11,295,958

	Allocated to:		
	Participating Employers	Withdrawn Employers	Total
B. *Unamortized Unfunded Vested Benefits Liability (UVB) at 12/31/80*			
1. Prior year UVB remaining unamortized at 12/31/80			
a) Unamortized at 12/31/79	$11,697,749	$ 0	$11,697,749
b) Allocations to employers who withdrew in 1980	(1582,354)	1,582,354	0
c) Amortization during 1980	(505,770)	0	(505,770)
d) Remaining unamortized at 12/31/80	$ 9,609,625	$1,582,354	$11,191,979
2. UVB added at 12/31/80			
a) Change in UVB during 1980	$ (401,791)	$ 0	$ (401,791)
b) Amounts reallocated at 12/31/80	164,821	(164,821)	0
c) Total	$ (236,970)	$ (164,821)	$ (401,791)
3. Unamortized UVB at 12/31/80 = 1 + 2	$ 9,372,655	$1,417,533	$10,790,188

Note

Amounts reallocated at 12/31/80 consist of $9,007 excluded under de minimus rule and $155,814 declared uncollectible from employers withdrawn in 1980.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL 115
PENSION PLAN

IV. EMPLOYER CONTRIBUTION HISTORY

	Employers Still Participating at:	
	12/31/79	12/31/80
1975 Plan Year	$ 789,799.20	N/A
1976 Plan Year	970,576.05	$ 832,560.05
1977 Plan Year	1,120,531.59	968,837.59
1978 Plan Year	1,244,240.01	1,095,454.01
1979 Plan Year	1,460,324.00	1,298,378.00
1980 Plan Year	N/A	1,431,082.00
5 Year Total	$5,585,470.85	$5,626,311.65

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL 115
PENSION PLAN

V. FACT SHEET FOR DETERMINING POTENTIAL WITHDRAWAL LIABILITIES FOR EMPLOYERS WITHDRAWING IN 1981

Components of Total Plan Liability
(before amortization)

Date Added (Source)		Amount	Total Plan Contributions	
			Plan Years	Amount
12/31/79		$11,697,749	1/1/75 to 12/31/79	$5,585,470.85
12/31/80:	Change in UVB	$ (401,791)	1/1/76 to 12/31/80	$5,626,311.65
	Reallocation	164,821		
		$ (236,970)		

Notes

1) Contributions shown are the total for all employers who had not withdrawn from the plan as of the date the liability component was added.

2) Each component of liability is allocated to participating employers based on the ratio of their contributions during the applicable time period.

3) Once allocated, each liability component is assumed to amortize at the rate of 5% each year from the date the component was added.

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

VI. COMPUTATION METHODS APPLICABLE UNDER THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

In accordance with the decisions made by the Trustees of the Local 115 Pension Plan, the following methods are used in calculating withdrawal liabilities under MEPPA:

(A) Withdrawal Liability Allocation Method

The amount of unfunded vested benefits allocable to a withdrawing employer is determined in accordance with Section 4211(b) of ERISA. This section is referred to as the "Presumptive Method."

(B) De Minimus Rule

The mandatory De Minimus Rule is applicable, as described in Section 4209 of ERISA. The maximum de minimus amount under this section is equal to the lesser of ¾ of 1 percent of the plan's unfunded vested benefits liability and $50,000.

(C) Employer Contribution History

Each withdrawing employer's share of the unfunded vested benefits liability will be determined based on 5 years of contribution history.

(D) Calculation of Withdrawal Payments

(1) The annual payment is calculated based on the withdrawing employer's highest contribution rate and average base units during the 10

plan years preceding withdrawal. For purposes of withdrawals during 1980, only the six plan years starting in 1974 are used. For withdrawals during 1981, seven plan years will be used.

(2) The annual amount due from a withdrawing employer is to be payable on a monthly basis.

UNITED RETAIL AND WHOLESALE EMPLOYEES TEAMSTERS LOCAL NO. 115 PENSION PLAN

VII. ACTUARIAL METHODS AND ASSUMPTIONS

(A) Asset valuation method

For the purpose of determining the unfunded vested benefits liability, assets are valued at market value.

(B) Persons included

Based on data provided to us, all persons entitled to coverage under the plan as of the valuation date are included in the calculations.

(C) Significant actuarial assumptions

(1) Investment return

6% compounded annually, net of investment expenses.

(2) Retirement age

Age 65, age after completion of 10 years of service, or age on the valuation date, whichever is greater.

(3) Mortality

(a) Healthy lives—The 1971 Group Annuity Mortality Table, projected to 1975.

(b) Disabled lives—The 1956 Railroad Retirement Board Disability Annuitants Mortality Table.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS LOCAL NO. 115
PENSION PLAN

WITHDRAWAL LIABILITY FOR YAHN & MC DONNELL, INC.

Date contribution obligation ceased: November, 1981

A. WITHDRAWAL LIABILITY

Employer's Contributions			Employer's Allocated Liability		
Period	Amount	% of Total	For Plan Years	Original Amount	Unamortized Amount
1975-1979	$235,613.50	4.218%	Through 12/31/79	$493,412	$468,741
1976-1980	260,253.00	4.626%	1/1/80-12/31/80	(10,962)	(10,962)
					$457,779

Total liability = $457,779

B. PAYMENT SCHEDULE

(1) Plan Year Ending	(2) Contribution Rate(s) in Year	(3) Date of Rate Change	(4) Average Rate in Year	(5) Total Contribution	(6) Base Units (Weeks) = (5) ÷ (4)
12/31/74	$12.00/$15.00	4/1/74	$14.250	$35,639.40	2,501*
12/31/75	$15.00/$17.50	4/1/75	16.875	38,367.50	2,274*
12/31/76	$17.50/$20.00	4/1/76	19.375	39,755.00	2,052*
12/31/77	$20.00/$23.00	7/1/77	21.500	42,826.00	1,992

12/31/78	$23.00/$26.00	7/1/78	24.500	47,907.00	1,955
12/31/79	$26.00/$29.00	7/1/79	27.500	66,758.00	2,428
12/31/80	$35.00	1/1/80	35.000	63,007.00	1,800
12/31/81	$39.00	1/1/81	N/A	N/A	N/A

* These 3 years produce highest average base units of 2,276.

Annual payment = $39.00 x 2,276 = $88,764
Monthly payment = $88,764 ÷ 12 = $7,397

Payment duration = 71 months at $7,397 plus a final payment of $851.

Peat, Marwick, Mitchell & Co.
February 25, 1982

APPENDIX B

MEMORANDUM

MARTIN E. SEGAL COMPANY

730 Fifth Avenue • New York, N.Y. 10019
(212) 586-5600

Date April 8, 1981

From Philip B. Polak

To Board of Trustees
M.M. & P. Pension Fund

Re M.M. & P. Pension Fund—
Unfunded Vested Liability

In accordance with your decision at your March Trustees' meeting to use our actuarial assumptions, we have calculated the Unfunded Liability for Vested Benefits *only* for the purpose of calculating Employer withdrawal liability under ERISA.

This figure as of December 31, 1979 is: $74,365,700.

When all the data for 1980 is available, we will calculate the change—if any—attributable to the 1980 plan year.

The above figure should not be confused with the unfunded past service liability of your plan which is used to determine the scheduled actuarial cost ($183,696,200).

At this point, we urge that we meet in the near future with Counsel and your Administrator to explore the procedures and substantive matters concerning the determination and collection of any withdrawal liability that can be presented to the Trustees for decision at your scheduled meeting next month.

The agenda for this advisor's meeting could include the following:

1. Notification required to all contributing employers.
2. Information to be provided on request—fees to be charged, if any.
3. Definition of "Withdrawal".
4. Identification of "employer" for withdrawal purposes (companies under "common control").
5. Calculation and collection of an employer's liability.

If any of the Trustees feel that such a meeting is not desirable at this time—or that other parties should be included—please let me or Counsel know as soon as possible.

Best regards.

/bn
cc: Co-Counsel
Fund Administrator